Supreme Court, U.S.
FILED
951237 DEC 5 - 1995
OFFICE OF THE CLERK

NO. 95- _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GARY WILLIAM BLACK

Petitioner

v.

STATE OF TEXAS,

Respondent

PETITION FOR A WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
TO THE TEXAS COURT OF CRIMINAL APPEALS

Kevin J. Clancy
2425 Cedar Springs
Dallas, Texas 75201
(214) 871-3000
State Bar No. 04262000
Attorney for Gary Black

42 pp

QUESTION PRESENTED

THE SEARCH WARRANT WAS INSUFFICIENT. IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES..... ii

LIST OF PARTIES..... iii

THE SUPREME COURT HAS JURISDICTION..... 2

PETITIONER PRESENTS AN IMPORTANT CONSTITUTIONAL ISSUE 2,3,4

THE SEARCH WARRANT WAS INSUFFICIENT. IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE..... 4,5

THE HARM TO PETITIONER 6,7,8

PETITIONER CHALLENGES THE HOLDING BELOW 8,9

ARGUMENT AND AUTHORITY 10,11,12

CONCLUSION 12

PRAYER 12

CERTIFICATE OF SERVICE 13

INDEX OF AUTHORITIES

Cases **Page**

Franks v. Delaware, 438 U.S. 154 [98 S.Ct. 2674, 57 L.Ed.2d 667] (1978) 3,9,11,12

Illinois v. Gates, 462 U.S. 213 (1983) 9,10

CONSITUTIONS AND STATUTES

U.S. CONST. AMEND. IV 3

28 U.S.C. § 1257. 2

LIST OF PARTIES

Gary William Black, is Petitioner. His attorney is:

Kevin J. Clancy
2425 Cedar Springs
Dallas, Texas 75201
(214) 871-3000
State Bar No. 04262000

Attorney for the Respondent, State of Texas are:

Daniel D. Guess
Assistant Criminal District Attorney
Frank Crowley Courts Building
133 N. Industrial, LB 19
Dallas, Texas 75207-4399
(214) 653-3624

Robert Huttash
Attorney for the State of Texas
P.O. Box 12405
Capital Station
Austin, Texas 78711
(512) 463-1660

NO. 95-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GARY WILLIAM BLACK,

Petitioner

v.

STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner, GARY WILLIAM BLACK, respectfully prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals and the Court of Appeals for the Fifth Supreme Judicial District of Texas.

THE SUPREME COURT HAS JURISDICTION

The Texas Court of Criminal Appeals denied Petitioner's Motion for Rehearing for Petition for Discretionary Review on September 7, 1995. The Court of Appeals rendered an opinion filed on March 3, 1995. The judgment invoked jurisdiction of this court pursuant to 28 U.S.C. § 1257. This petition for writ is filed within 90 days after Final Judgment.[1]

PETITIONER PRESENTS AN IMPORTANT CONSTITUTIONAL ISSUE

THE SEARCH WARRANT WAS INSUFFICIENT IN VIOLATION OF PETITIONERS FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE.

The Fourth Amendment to the United States Constitution provides that "The right of the people to be secure in their

---

[1] *A copy of the denial of Petition for Discretionary review is attached as Appendix "A".*

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized, U.S. CONST. AMEND. IV.

The Texas Court of Criminal Appeals refusal to grant Discretionary Review and the Fifth Supreme Judicial Appeals Court of Texas holding below incorrectly holds that the Search Warrant was sufficient. In the instant case the Search Warrant Affidavit contains statements that the Court of Appeals held were made with reckless disregard for the truth and under *Franks v. Delaware, 438 U.S. 154 [98 S.Ct. 2674, 57 L.Ed.2d 667] (1978)*, this statement was necessary to establish probable cause and once it is excised

there is not probable cause to search. This was a clear violation of Defendant's Fourth Amendment privilege against unreasonable search and seizures.

STATEMENT OF CASE

The Appellant was charged and convicted of possession of methamphetamine and the trial was before the Court. The Appellant then entered a plea of not guilty. The Court found the Defendant guilty, and punishment was set by the Court. The Appellant was sentenced with a plea bargain agreement to fifteen years confinement in the Texas Department of Corrections. the Appellant was sentenced on November 11, 1993. Written Notice of Appeal was filed on November 11, 1993, and we are properly before this Court.

In Cause No. F90-46746, Appeal No. 05-94-00555-CR, the Appellant plead not

guilty to possession of a firearm. The Court took judicial notice of the Motion to Suppress in the Statement of Facts of the felony case that occurred on the same date and under the same circumstances, and denied the Motion to Suppress, and found the Appellant guilty and gave the plea bargain agreement sentence of ninety days in jail. Appellant was sentenced on December 16, 1993, and written Notice of Appeal was given on January 6, 1994, and we are properly before the Court on this consolidated case.

The Opinion of the Court was originally filed on March 3, 1995 and the Motion for Rehearing was denied on April 27, 1995. Petition for Discretionary Review was filed and Rehearing of the Petition for Discretionary Review was denied on September 7, 1995.

THE HARM TO PETITIONER

REASONS FOR GRANTING THE WRIT:

The decision of the Court below is in conflict with this Court's decisions.

During the course of the hearing on Defendants' Motion to Suppress, Detective R.C. Mitchell testified that he obtained the search warrant regarding the Defendants. The search warrant (State's Exhibit No. 1), states in part as follows:

> I, the Affiant, received information from a confidential, reliable informant that the person staying in Room 515 at the Residence Inn located at 1033 North Central Expressway was trafficking in drugs...Detectives went to the location and established surveillance on the location. Affiant and other detectives observed the person described in Paragraph 3 exit

Room 515 at the described location.

Search warrant is attached as Appendix "B".

At the Motion to Suppress hearing, Detective Mitchell, under cross-examination, admitted that he did not see the Defendants come out of Room 515, as stated in the search warrant. (R.35).

Since Detective Mitchell did not see the Defendants leave the room, only that they came from the general area, there is insufficient basis for the police to even follow the Defendants in this instant case.

After officers followed the Defendants for a number of miles, they pulled them over. Defendants' position is that the officers had no probable cause in which to stop the Defendants at that time.

The Appeals Court concluded in their

Opinion on page 11, that the Officer with reckless disregard for the truth, said he saw Appellant leave Room 515. "We did not consider that fact in our analysis of the Affidavit for Probable Cause". If you excise that statement from the affidavit, the affidavit does not contain any probable cause. See Appendix "B" attached Search Warrant Affidavit. The Petitioner contends that the Search Warrant Affidavit when excised is insufficient and therefore his rights under the Fourth Amendment to the United States Constitution were violated.

PETITIONER CHALLENGES THE HOLDING BELOW

The Court of Appeals in their opinion and the Texas Court of Criminal Appeals by denying Discretionary Review concluded that after excising the portion of the affidavit that was made with reckless disregard for the truth by the

affiant, that the affidavit was in fact sufficient. The Supreme Court has held in *Illinois v. Gates, 462 U.S. 213 (1983)* that the totality of the circumstances test for probable cause is the test that will be used.

There is an exception to the four-corners rule. When a defendant makes a substantial preliminary showing that the affidavit includes a false statement knowingly or intentionally made, or made in reckless disregard of the truth, and if the defendant also shows that the statement is necessary to establish probable cause then the defendant is entitled to a hearing. *Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674,57 L.Ed.2d 667 (1978)*. The affidavit in question does not meet sufficient probable cause.

ARGUMENT AND AUTHORITY

THE SEARCH WARRANT WAS INSUFFICIENT IN VIOLATION OF PETITIONERS FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE.

The Court of Appeals in their opinion and the Texas Court of Criminal Appeals by denying Discretionary Review concluded that after excising the portion of the affidavit that was made with reckless disregard for the truth by the affiant, that the affidavit was in fact sufficient. The Supreme Court has held in *Illinois v. Gates, 462 U.S. 213 (1983)* that the totality of the circumstances test for probable cause is the test that will be used.

There is an exception to the four-corners rule. When a defendant makes a

substantial preliminary showing that the affidavit includes a false statement knowingly or intentionally made, or made in reckless disregard of the truth, and if the defendant also shows that the statement is necessary to establish probable cause then the defendant is entitled to a hearing. *Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674,57 L.Ed.2d 667 (1978).* The affidavit in question does not meet sufficient probable cause.

If, after evidentiary hearing, defendant establishes by a preponderance of evidence that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by affiant in search warrant affidavit, and, with affidavit's false material set to one side, the affidavit's remaining content is insufficient to

establish probable cause, search warrant must be voided and fruits of search excluded to the same extent as if probable cause was lacking on the face of the affidavit *Franks v. Delaware, 438 U.S. 154 [98 S.Ct. 2674, 57 L.Ed.2d 667] (1978).*

CONCLUSION

For the foregoing reasons Petitioner prays that the writ of certiorari to the Texas Court of Criminal Appeals issue.

PRAYER

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Texas Court of Criminal Appeals and the Fifth Supreme Judicial Court of Appeals of Texas.

Respectfully submitted,

KEVIN J. CLANCY
2425 Cedar Springs
Dallas, Texas 75201
(214) 871-3000
State Bar No. 0426200
Attorney for Petitioner

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

September 7, 1995

COA#: 05-93-01819-CR

RE: Case No. 0674-95

STYLE: BLACK, GARY WILLIAM

AUSTIN SEP 11'95 U.S.POSTAGE 0.20

The Court has this day rejected the appellant's motion for rehearing for failure to comply with Rule 230(b) T.R.A.P.

Troy C. Bennett, Jr., Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: KEVIN J CLANCY
2425 CEDAR SPRINGS
DALLAS TX 75201

APPENDIX "A"

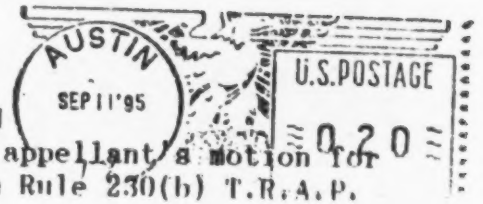
BEST AVAIL

ABLE COPY

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

September 7, 1995

COA#: 05-94-00555-CR
RE: Case No. 0675-95
STYLE: BLACK, GARY WILLIAM



The Court has this day rejected the appellant's motion for rehearing for failure to comply with Rule 230(b) T.R.A.P.

Troy C. Bennett, Jr., Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: KEVIN J CLANCY
2425 CEDAR SPRINGS
DALLAS TX 75201

27

APPENDIX "A"

APPENDIX "B"

STATE OF TEXAS

COUNTY OF DALLAS 90 664

On August 23, 1990 I, the Affiant received information from a confidential reliable informant that the persons staying in room #515 at the Residence Inn located at 10333 North Central Expressway were trafficking in drugs. Affiant and other Dallas Police Department Narcotics Detectives went to the location and established surveillance on the location. Affiant and other Detectives observed the person described in paragraph 3 exit room 515 at the above described location at 11:00 p.m. on this date. Dallas police Corporal J.E. Wright #2851 observed Gary William Black carrying the above described black gym bag in his right hand as he walked into the parking lot at the location. Corporal Wright observed Gary William Black place the above described black gym bag into the open bed of his Pickup truck which was at the location. Affiant and other Detectives followed the above described person as he drove off from the location and proceeded to the Park Suites Hotel located at 13131 North Central Expressway where they has marked element 633 stop the vehicle. Affiant identified himself as a Dallas Police Officer to Gary William Black and advised him that a Narcotics Investigation was being conducted into his activities. Affiant observed the black gym bag laying in open view in the rear bed of the subject's Pick up Truck. Corporal Wright passed his trained Narcotic Detection Canine "Taffy" #61 by the black gym bag and obtained a positive alert for the presence of one of the Controlled Substances described in paragraph 2.

APPENDIX "B" 2

Canine "Taffy" 61 has been trained detect odors of the Controlled Substances described in paragraph 2 and alert on this presence by biting, scratching, and barking at the object containing the substance, Corporal Wright has been trained to recognize an alert by Canine "Taffy". Affiant observed Canine #61 alert positive on the black gym bag on 082390 at 11:30PM.

R.C. MITCHELL
AFFIANT

Subcribed and sworn to before me the said Affiant on this the 24th day of AUGUST, 1993.

MAGISTRATE DALLAS COUNTY, TEXAS

[SEAL]

APPENDIX "C"

AFFIRMED and Opinion Filed March 3, 1995.

STATE OF TEXAS
SEAL

In the Court of Appeals
Fifth District of Texas at Dallas

No. 05-93-01819-CR
No. 05-94-00555-CR

GARY WILLIAM BLACK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 283rd District Court, Dallas County, Texas and County Criminal Court No. 2, Dallas, Texas Trial Court Cause No. F90-51137-LJT and MA90-46746-M

OPINION

Before Justices Baker, Maloney, and Hill[2]
Opinion By Justice Baker

---

[2] The Honorable John G. Hill, Former Chief Justice, Second District of Texas at Fort Worth, sitting by assignment.

APPENDIX "C" 2

Appellant contends the trial court erred in denying his pretrial motion to suppress evidence. He argues the trial court erred because there was no probable cause to stop and detain him. He also contends the affidavit for the search warrant was insufficient, and the informant's information was stale. We conclude the officers had reasonable suspicion to stop and detain appellant. We conclude the affidavit supporting the search warrant was enough for the magistrate to find probable cause to issue the warrant. Finally, we conclude the informant's information to the officers was not stale. We affirm the trial court's judgment.

PROCEDURAL BACKGROUND

The State charged appellant with possession of amphetamines with intent to deliver. The State also charged

appellant with unlawfully carrying a weapon. Both charges resulted from appellant's arrest under a search warrant. Appellant moved to suppress the evidence. He contended both his original stop and detention and the search warrant's validity. The trial court denied appellant's pretrial motion to suppress.

Appellant then entered a no-contest plea to both charges. In the possession with intent to deliver case, the trial court assessed a fifteen-year sentence and a $1500 fine. In the unlawfully carrying a weapon case, trial court assessed a ninety-day sentence and a $750.00 fine. Appellant's notice of appeal specifically stated his appeal involved the trial court's denial of his motion to suppress.

APPELLANT'S CONTENTIONS

Appellant contends the trial court

erred in denying his motion to suppress because the officers did not have probable cause to make the initial stop and detain him. He contends the affidavit for the search warrant was insufficient. Finally, he contends the informant's information was stale.

Appellant notes the search warrant affidavit states the officer saw appellant and Jackie Roberts leave room 515 at a motel on North Central Expressway in Dallas. However, at the motion to suppress hearing, the officer admitted he did not see appellant come out of a specific room. Appellant concludes the police had no basis to follow him and Roberts because of this discrepancy. He argues the officer had no probable cause to stop him and Roberts after following them.

Appellant also argues the drug detection dog the officers used had no

training to alerts on methamphetamine. Appellant asserts this made the affidavit insufficient to permit the magistrate to issue the search warrant.

Finally, appellant argues the affidavit does not state how the officers' confidential informant got the information about appellant, when the informant obtained the information, and the age of the information.

THE MOTION TO SUPPRESS HEARING

The officer who executed the search warrant affidavit testified at the suppression hearing. He said a confidential informant told him appellant and his codefendant, Jackie Roberts, trafficked in amphetamines. The informant told the officer a man matching appellant's description and Roberts were in Room 515 at a certain motel. The informant named Roberts and told officer she was with an unknown male.

The informant told the officer Roberts and appellant were driving a white Chevrolet pickup truck with tinted windows.

The officer said this informant was reliable. The informant had given reliable tips on several occasions in the past. The informant was familiar with drugs and had provided information on drug trafficking cases.

Based on this information, the officer and other narcotics unit officers set up surveillance at the motel. While at the motel, the officer learned the motel's records showed appellant and Roberts in Room 515. The officer saw appellant and Roberts come from an area around room 515 and go to a white Chevrolet pickup truck. Appellant carried a black gym bag and put the bag in the truck bed. He and Roberts drove off in the pickup. The officers noted

appellant made "heat runs". Following his "heat runs", appellant stopped in the parking lot of another motel on North Central Expressway. The officer approached appellant and told appellant he was conducting a narcotics investigation. The officer said when he first approached appellant he did not place appellant under arrest. Appellant refused to speak with the officer. He told the officer that neither the pickup truck nor the gym bag belong to him. However, appellant refused to consent to a search of the bag.

At this point, the officer placed a drug detection dog in the open bed of the pickup. The dog alerted on the gym bag. The officer then detained appellant because the officer believed the gym bag contained narcotics. The officer got a search and arrest warrant to search the gym bag. The gym bag contained

methamphetamine and a pistol. The officer then arrested appellant.

APPLICABLE LAW

A. Suppression Hearing

1. The Trial Judge's Function

At a suppression hearing, the trial judge is the sole judge of witnesses' credibility and the weight given their testimony. *Gibbs v. State,* 819 S.W.2d. 821, 830-31 (Tex. Crim. App. 1991), *cert denied,* 502 U.S. 1107 (1992); *Brown v. State,* 830 S.W.2d. 171, 173 (Tex. App-Dallas 1992, pet.ref'd). The trial judge may accept or reject any or all of a witness's testimony. *Johnson v. State,* 803 S.W. 2d. 272, 287 (Tex. Crim. App. 1990), *cert denied,* 501 U.S. 1259 (1991). *overruled on other grounds, Heitman v. State,* 815 S.W. 2d 681, 685 n.6 (Tex.Crim.App. 1991); *Brown,* 830 S.W. 2d at 173. It is within the trial court's discretion to determine the admissibility

of the evidence. *Jackson v. State*, 575 S.W. 2d 567, 570 (Tex. Crim. App.[Panel Op.] 1979); *Dawson v. State*, 868 S.W.2d 363,367 (Tex.App.--Dallas 1993, pet. ref'd).

2. Standard of Review

On appeal, we do not engage in our own factual review. We only consider whether the trial court improperly applied the law to the facts. *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App. 1990); *Brown*, 830 S.W.2d at 174. Absent a showing of an abuse of discretion, we do not disturb the trial court's findings. *Maddox v. State*, 682 S.W.2d 563, 564 (Tex. Crim.App. 1985); *Brown*, 830 S.W.2d at 174.

We review the evidence in the light most favorable to the trial court's ruling. *Daniels v. State*, 718 S.W.2d 702, 704 (Tex.Crim.App.), *cert denied*, 479 U.S. 885 (1986), *overruled on other*

grounds, Juarez v. State, 758 S.W.2d 772, 780 n.3 (Tex.Crim.App. 1988); *Brown,* 830 S.W.2d at 174. If the evidence supports the trial court's ruling, we do not disturb that ruling. *Johnson v. State,* 803 S.W.2d at 287. We uphold the trial court's ruling on any valid legal theory, regardless of whether the State argued the theory in trial court or on appeal. *See Lewis v. State,* 664 S.W.2d 345, 347 (Tex.Crim.App. 1984).

3. Investigatory Stop

Law enforcement officers may stop and briefly detain persons of criminal activity on less information that the United States or Texas Constitutions require for probable cause to arrest. *See Terry v. Ohio,* 392 U.S. 1, 22 (1968); *Crockett v. State,* 803 S.W.2d 308, 311 (Tex.Crim.App.1991); *Brown,* 830 S.W.2d at 174. An investigatory stop requires only reasonable suspicion to justify the stop,

not probable cause. *United States v. Sokolaw*, 490 U.S. 1, 7 (1989); *Johnson v. State*, 658 S.W.2d 623, 626 (Tex.Crim.App. 1983); *DuBose v. State*, 864 S.W.2d 656, 660 (Tex.App.--Houston [1st Dist.] 1993 pet. granted).

To justify an investigation detention, the officer must have specific articulable facts that, premised upon his experience and personal knowledge, when coupled with the logical inferences from those facts, would warrant intruding on the detained citizen's freedom. *Garza v. State*, 771 S.W.2d 549, 558 (Tex.Crim.App. 1989); *Cuero v. State*, 845 S.W. 2d 387, 392 (Tex.App.--Houston [1st Dist] 1992 pet.ref'd); *Brown*, 830 S.W.2d at 174. These facts must amount to more than a mere hunch or suspicion. *Williams v. State*, 621 S.W.2d 609,612 (Tex.Crim.App.[Panel Op.]1981). For a valid *Terry* stop, the officer must have a

reasonable suspicion that some unusual activity is occurring, some suggestion that connects the detained person with the unusual activity, and some indication that connects the unusual activity with the crime. *See Johnson*, 658 S.W.2d at 626; *Brown*, 830 S.W.2d at 174. In testing the validity of a *Terry* stop, we consider the totality of the circumstances. *Sokolaw*, 490 U.S. at 7; *Howe v. State*, 874 S.W.2d at 895, 900 (Tex.App.--Austin 1994, no pet.).

An unverified tip from a known informant is sufficiently reliable to justify a *Terry* stop. *Adams v. Williams*, 407 U.S. 143, 147 (1972). Corroboration of the details of an informant's tip by independent police work is another consideration in the analysis. *Lowery v. State*, 843 S.W.2d 136, 141 (Tex.App. -- Dallas 1992, pet.ref'd).

4. The Probable Cause Affidavit

To issue a search warrant, the magistrate must find probable cause exists to support his decision. Probable cause exists when the facts allow the magistrate to conclude the object of the search is probably on the premises the officers seek to search when the magistrate issues the warrant. *Bower v. State*, 769 S.W.2d 887,902 (Tex. Crim.App.), *cert. denied*, 492 U.S. 927 (1989), *overruled on other grounds*, 815 S.W.2d 681, 685 n.6 (Tex.Crim.App.1991). The probable cause standard is practical, not technical. *Bower*, 769 S.W.2d at 902. Technical standards such as proof beyond a reasonable doubt or by a preponderance of the evidence do not blind the magistrate. The magistrate's sole concern is probability. *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *Bower*, 769 S.W.2d at 902.

Texas sets no time limit on the age

of the informant's information in an affidavit. *Bower,* 769 S.W.2d at 902-03. The facts of each case determine how long a time lapse we permit without destroying the basis for a reasonable belief about the continuance of the situation. See *Moore v. State,* 456 S.W.2d 114, 115 (Tex.Crim.App. 1970).

When we review a magistrate's determination of probable cause, we apply a totality of the circumstances analysis. *Gates,* 462 U.S. at 238-39; *Bower,* 769 S.W.2d at 901. We give great deference to the magistrate's determination of probable cause. United States v. Ventresca, 380 U.S. 102, 109 (1965); *Bower,* 769 S.W.2d at 902. We do not make a *de novo* probable cause determination. Rather, after viewing all the evidence, we determine only if there is substantial evidence in the record to justify the magistrate's decision to issue the

warrant. *Gates*, 460 U.S. at 236-37; *Bower*, 769 S.W.2d at 902.

If a defendant claims an affidavit contains a false statement, the defendant must prove by preponderance of the evidence that the affiant made the false statement intentionally or with reckless disregard for the truth. *Frank v. Delaware*, 438 U.S. 154, 155-56 (1978); *Dancy v. State*, 728 S.W.2d 772, 782 (Tex.Crim.App.) *cert. denied*, 484 U.S. 975 (1987); *Brown v. State*, 831 S.W.2d 847, 848 (Tex.App. -- Dallas 1992), *aff'd*, 870 S.W.2d 53 (Tex.Crim.App. 1994).

If the defendant meets this burden, we disregard the affidavit's false material. If the affidavit's remaining content does not show probable cause, we must void the search warrant. We exclude the fruits of the search as if the affidavit lacked probable cause on

its face. *Franks*, 438 U.S. at 156; *Dancey*, 728 S.W.2d at 780; *Brown*, 831 S.W.2d at 848. However, if the remaining facts establish probable cause, the affidavit is sufficient, despite the false statement. *See Dancy*, 728 S.W.2d at 780.

A drug detection dog sniffing luggage is neither an investigatory stop nor a search and seizure. *United States v. Place*, 462 U.S. 696, 707 (1983); *Crockett*, 803 S.W.2d at 310 n.5; *Accaria v. State*, 661 S.W.2d 249, 251 (Tex.App. -- Houston [1st Dist.] 1983, no pet.). A positive alert by a drug detection dog together with other facts is enough for probable cause for an arrest and search. *See Florida v. Royer*, 460 U.S. 491, 506 (1983); *Place*, 462 U.S. 696; *Walsh v. State*, 743 S.W.2d 687, 689 (Tex.App. -- Houston [1st Dist.] 1987, no pet.). That a drug dog may not be one hundred percent

reliable does not require the deletion of the alert as a factor in determining the magistrate's probable cause conclusion. *See Walsh*, 743 S.W.2d at 689.

APPLICATION OF LAW TO THE FACTS

A. The Investigatory Stop

In his first point of error, appellant contends the trial court erred in denying his motion to suppress the evidence. He argues the police had no probable cause to stop and detain. He notes the search warrant affidavit stated the officer learned appellant was staying in room 515 at a motel on North Central Expressway. The affidavit also stated the officer saw appellant leave room 515 at the motel.

However, at the motion to suppress hearing, the officer testified he did not see appellant come out of room 515 as stated in the search warrant. Appellant asserts the police did not have a reason

to follow him because of the conflict between the officer's affidavit and his testimony. He concludes the officers had no probable cause to stop him.

First, the officers need only a *reasonable suspicion*, not *probable cause* to stop and detain. *See Terry*, 392 U.S. at 22; *Brown*, 830 S.W.2d at 174. We conclude the evidence before the trial judge justified appellant's temporary detention. A reliable informant told the officers appellant and Roberts were in room 515 at a motel on North Central Expressway. The informant told the officers appellant and Roberts trafficked in drugs. The informant told the officers the two would be in a white Chevrolet pickup truck with tinted windows.

During their surveillance of the motel, the officers verified the informant's information. The officers

saw appellant and Roberts leave the area of their room at the motel and go to a white Chevrolet pickup with tinted windows. Appellant placed a black gym bag in the bed of the pickup truck. The officers followed appellant and Roberts until they stopped at another motel, he denied owning the pickup or the black gym bag. Appellant was uncooperative and belligerent. We view this evidence in the light most favorable to the trial court's ruling. *Daniels*, 718 S.W.2d at 704. We conclude the officer possessed specific articulable facts, considering his personal experience and his inferences from those facts, to stop and detain appellant to investigate further. We hold the evidence supports the trial court's ruling. We do not disturb that ruling. *Johnson*, 803 S.W.2d at 287. We overrule appellant's first point of error.

B. The Probable Cause Affidavit

In his second point of error, appellant again points to the inconsistency between the officer's search warrant affidavit and his testimony at the suppression hearing. He also complains the drug detection dog did not have the necessary training to alert on methamphetamine. He argues we should strike the officer's statement and the dog's alert from the search affidavit. He argues that without theses two facts the affidavit is insufficient to support probable cause to issue a search warrant. We disagree.

For purposes of this opinion, we assume the officer, with reckless disregard for the truth, said he saw appellant leave room 515. We do not consider that fact in our analysis of the affidavit for probable cause.

Appellant's other complaint deals with the drug detection dog alert. The affidavit states the officer handling the dog passed his trained narcotics detection canine #61, "Taffy", by the black gym bag. The dog made a positive alert for the presence of one of the controlled substances described in the affidavit.

The affidavit further stated Taffy received training to detect the odors of the controlled substances by biting, scratching, and barking at the object containing the substance. The record of the suppression hearing shows the officer handling the dog trained her to alert on methamphetamine. However, the record also shows the dog's most recent certificates did not show training to alert on methamphetamine.

Probable cause to support the issue of a search warrant exists if the facts

submitted to the magistrate are enough to justify the magistrate's conclusion that the black gym bag contained narcotics when he issued the warrant. The magistrate's sole concern is the probability that probable cause exists. *Gates*, 462 U.S. at 238. We give great deference to the magistrate's determination of probable cause. *Ventresca*, 380 U.S. at 109; *Bowers*, 769 S.W.2d at 902.

Appellant had the burden to prove the falsity or reckless disregard for the truth of the affiant's statement about the dog's alert on the gym bag, the trial court judges the weight and credibility of the testimony it heard. *Romero*, 800 S.W.2d at 543; *Brown*, 830 S.W.2d at 173. Viewing the evidence supports that ruling, we conclude the evidence supports that ruling. We do not disturb that ruling. *Johnson*, 803 S.W.2d

at 287. We overrule appellant's second point of error.

C. The Informant's Information

In his third point of error, appellant contends the trial court erred in denying his motion to suppress because the informant's information was stale. He contends the search affidavit did not state how or when the informant got his information. The law does not set a time limit on the age of information in a search affidavit. *Bower*, 769 S.W.2d at 903. The time frame depends upon the facts of a particular case. *Bower*, 769 S.W.2d at 903.

The affidavit stated the officer received information from a confidential, reliable informant on August 23, 1990. The informant told the officer appellant and Roberts were trafficking in drugs in room 515 at a certain motel. The

informant said the two drove a white Chevrolet pickup truck with tinted windows. That same day, the officer verified that Roberts was in Room 515 at that motel. He also verified that appellant and Roberts were using a white Chevrolet pickup truck with tinted windows. We conclude under the circumstances of this case the informant's information was not stale. The trial court did not abuse it discretion in finding the affidavit furnished the magistrate probable cause. We overrule appellant's third point of error.

We affirm the trial court's judgment.

JAMES A. BAKER
JUSTICE

Do Not Publish
Tex.R.App.P.90
931819F.U05